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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206212
Party	Defendant entrotech, inc.
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Signature	/Lisa M. Martens/
Date	09/21/2015
Attachments	2015-09-21 Reply ISO Applicants Motion to Strike NOR Halsey and Foor FI- NAL.pdf(188208 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of application Serial Nos.:

85/499,349 for the mark **CHLORADERM**  
85/499,345 for the mark **CHLORABSORB**  
85/499,337 for the mark **CHLORABOND**  
85/499,332 for the mark **CHLORADRAPE**

Filed on December 19, 2011

Published in the *Official Gazette* on May 29, 2012

CAREFUSION 2200, INC.,  <i>Opposer,</i>  v.  ENTROTECH LIFE SCIENCES, INC.,  <i>Applicant.</i>
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Combined Opposition Proceeding No.: 91-  
206,212

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPLICANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE  
OPPOSER'S NOTICES OF RELIANCE OFFERING IN EVIDENCE THE DISCOVERY  
DEPOSITIONS OF NON-PARTY WITNESSES  
DR. JOHN S. FOOR, M.D. AND MR. JOHN HALSEY UNDER 37 C.F.R. § 2.120(j)**

There is no dispute that Opposer's Notices of Reliance offering the discovery depositions of Dr. John S. Foor, M.D. and Mr. John Halsey into evidence are improper. Opposer has conceded that neither Dr. Foor nor Mr. Halsey was an officer, director, or managing agent of Applicant at the time of his discovery deposition. Additionally, Opposer failed to timely oppose Applicant's motions to strike. Finally, Opposer's request that the Board, in the interest of equity, disregard the relevant

rules is not supported by any authority. Therefore, Applicant's Motions to Strike should be granted and the Board should strike Opposer's Notices of Reliance offering into evidence the discovery depositions of non-party witnesses Dr. Foor and Mr. Halsey.

### **I. Opposer Has Conceded That Its Notices of Reliance Are Improper**

The Trademark Rules of Practice guide the admissibility of evidence in Board proceedings and provide that "[t]he discovery deposition *of a party* (or anyone who, at the time of taking the deposition, was an officer, director, or managing agent of a party, or a person designated under Fed. R. Civ. P. 30(b)(6) or 31(a)(4) to testify on behalf of a party) may be offered in evidence *by any adverse party*." T.B.M.P. § 704.09 (emphasis added). At the time Dr. Foor's and Mr. Halsey's discovery depositions were taken, neither was an officer, director, nor managing agent of Applicant. Opposer admits this critical fact. (Dkt. No. 79, p. 1.) Therefore, Opposer's Notices of Reliance offering into evidence the discovery depositions of Dr. Foor and Mr. Halsey are improper and must be stricken.

### **II. Opposer Failed to Timely Oppose Applicant's Motions to Strike**

On May 1, 2015, Applicant filed and served on Opposer by email, as previously agreed to by counsel for the parties, its Motions to Strike. "A brief in response to a motion . . . must be filed within 15 days from the date of service of the motion[.]" unless the motion was served via mail. T.B.M.P. 502.02(b); 37 C.F.R. § 2.119(c). Per the foregoing rule and the parties' agreement regarding email service, Opposer's responses to Applicant's motions, if any, were due by Saturday, May 16, 2015 (effectively Monday, May 18, 2015). Opposer served its opposition brief on September 4, 2015 – 109 days late.

Applicant's Motions to Strike should be granted because of Opposer's extreme tardiness in responding to Applicant's Motions to Strike. Opposer's untimely response to Applicant's Motions to Strike should be ruled, in effect, a concession as to their merit. *See* 37 C.F.R. 2.127(a) ("When a

party fails to file a brief in response to a motion, the Board may treat the motion as conceded”); *Newhoff Blumberg Inc. v. Romper Room Enterprises, Inc.*, 193 U.S.P.Q. 313, 315 (TTAB 1976) (“We find that petitioner's failure to file a timely responsive brief to respondent's motion for judgment under Rule 2.132(b) conceded it. Respondent's motion under Rule 2.132(b) is granted as having been conceded.”)

### **III. Opposer Requests That The Board Ignore The Rules**

Despite its acknowledgement that the evidence is improper, as well as its failure to timely respond to Applicant's Motions to Strike, Opposer pleads with the Board to ignore the relevant rules and allow Dr. Foor's and Mr. Halsey's discovery depositions to be allowed into evidence based on equitable considerations. Opposer has not cited any authority allowing the Board to depart from the plain language of 37 C.F.R. § 2.120(j) in the interest of equity. Although Opposer cites to *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 U.S.P.Q.2d 1734 (TTAB 2014), this opinion merely reflects the Board's decision in that particular case not to rule on certain of applicant's motions to strike. The opinion never addresses the nature or merit of applicant's motions to strike or the authority upon which they were based. Thus, *Ikea* is inapplicable.

Furthermore, Opposer has failed to seek any relief offered under 37 C.F.R. § 2.120(j)(2). 37 C.F.R. § 2.120(j)(2) allows the Board to consider the discovery deposition of any witness when “exceptional circumstances exist as to make it desirable, in the interest of justice, to allow the deposition to be used.” However, “[t]he use of a discovery deposition by any party under this paragraph will be allowed only by stipulation of the parties approved by the Trademark Trial and Appeal Board, or by order of the Board on motion, which . . . shall be filed promptly after the circumstances claimed to justify use of the deposition became known.” Here, Opposer has *never* filed a motion requesting leave to use the discovery depositions of Dr. Foor and Mr. Halsey, much

less one filed promptly after the circumstances claiming to justify use of the depositions became known to Opposer.

Also, Opposer should not be allowed to circumvent the ruling of the District Court for the Southern District of Ohio quashing its subpoena for the deposition of Dr. Foor.<sup>1</sup> Opposer had no reason to believe – and does not argue otherwise – that Applicant would stipulate to allow Dr. Foor's discovery deposition into evidence. Thus, Opposer should have provided reasonable time for compliance when it untimely served Dr. Foor with a subpoena for his deposition during its testimony period knowing that Dr. Foor had many professional commitments as a vascular surgeon. It did not, as set forth in the ruling of the Court granting Dr. Foor's motion to quash. Opposer has no one but itself to blame for its failure to timely serve Dr. Foor with a subpoena. Were the Board to allow Opposer, now, to offer the discovery deposition of Dr. Foor into evidence, it would have the undesirable effect of rewarding Opposer for its failure to timely serve Dr. Foor with a subpoena.

Finally, Opposer has not identified any exceptional circumstances that weigh in favor of the Board ignoring the relevant rules. Opposer incorrectly submits that Dr. Foor's and Mr. Halsey's discovery depositions should be allowed because they were officers of Applicant's sometime before their depositions were taken. However, the rules only allow for the submission of a discovery deposition if the witness was an officer, director, or managing agent of a party at the time the deposition **was taken**. See 37 C.F.R. § 2.120(j)(1).

Additionally, Opposer attempts to mislead the Board by arguing that Dr. Foor is a major fact witness in this case. Opposer does not identify any testimony of Dr. Foor's relevant to likelihood of confusion, instead only generally alleging Dr. Foor's involvement in Applicant's and Opposer's business dealings. In any event, James McGuire, Applicant's main principal, made very clear in his

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<sup>1</sup> Opposer never served a subpoena on Mr. Halsey for his deposition during its testimony period.

testimonial deposition that Dr. Foor's prior honorary title of medical director did not make Dr. Foor an officer of Applicant and that Dr. Foor never had any binding authority over Applicant:

Q. Has [Dr. Foor] ever had binding authority over the company?  
A. Absolutely not.

(Declaration of Lisa M. Martens, Ex. A; Testimony Deposition of James McGuire, 68:13-15.)

#### **IV. Conclusion**

Applicant respectfully requests the Board to strike Opposer's Notices of Reliance offering Dr. Foor's and Mr. Halsey's discovery depositions and their exhibits in evidence from the record.

Dated: September 21, 2015

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

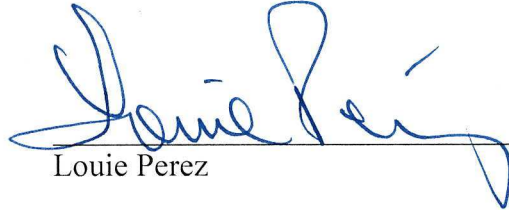
By                     /s/ Lisa M. Martens                      
LISA M. MARTENS  
PAUL A. BOST  
NANCY L. LY

Attorneys for Applicant,  
ENTROTECH LIFE SCIENCES, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document has this 21st day of September, 2015 been mailed by electronic mail, as agreed to by counsel for the parties, to Opposer's counsel of record:

Joseph R. Dreitler, Esq.  
Mary R. True, Esq.  
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Louie Perez

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**DECLARATION OF LISA M. MARTENS**

I, Lisa M. Martens, hereby declare and state as follows:

1. I am a Partner with the law firm of Sheppard Mullin Richter & Hampton LLP, which represents Applicant Entrotech Life Sciences, Inc. ("Applicant") in this proceeding. I am duly licensed to practice law in the states of California and Illinois, and am authorized to practice before the Trademark Trial and Appeal Board of the United States Patent and Trademark Office. I have

personal knowledge of the facts stated in this declaration and can and would testify truthfully thereto if called upon to do so.

2. Annexed hereto as **Exhibit A** is a true and correct copy of page 68 from the testimony deposition of James McGuire taken on May 12, 2015.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my personal knowledge and understanding.

Dated: September 21, 2015

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By                     /s/ Lisa M. Martens                      
LISA M. MARTENS

Attorney for Applicant,  
ENTROTECH LIFE SCIENCES, INC.

# **EXHIBIT A**

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Q. Has he ever had binding authority over the  
any?

A. Absolutely not.

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